



AT&T Corp. Petition for Declaratory Ruling Regarding Enhanced Prepaid Calling Card Services (WC Docket 03-133);

Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges (WC Docket No. 02-361)

I. The Commission Should Limit Immediate Consideration of the AT&T Calling Card Petition to the Facts Presented in the Original Petition

A. The Commission Must Continue Its Recent Pattern of Specific, Fact-Based Determinations on Enhanced and IP-Enabled Services

On November 22, 2004, AT&T filed an *ex parte* seeking to amend its May 15, 2003 petition for declaratory ruling regarding AT&T's Enhanced Pre Paid Card (EPPC) service. The original petition addressed the specific issue of whether AT&T's EPPC services that transmit to its customers an advertisement or other information unrelated to call processing are enhanced services that use jurisdictionally interstate telecommunications services.¹ AT&T filed its petition in response to a jurisdictional ruling by the Regulatory Commission of Alaska (RCA) requiring payment of intrastate access charges for Alaska-to-Alaska pre-paid card calls. The facts at issue in the RCA proceeding are the same facts at issue in AT&T's May 15th EPPC Petition.

In the November AT&T *ex parte*, AT&T seeks to amend its original petition by describing two new EPPC services. First, according to AT&T, it has added an interactive service to the original EPPC service. Second, AT&T is considering launching an IP-based variant of its enhanced prepaid card service.² In its original filing, AT&T does not describe a service that is either interactive or IP-based, offered over an IP network, or utilizes IP technology in any other way. Given the record presented, the Commission should limit its ruling on the AT&T petition to the basic set of facts presented in the original petition.

By issuing its orders regarding pulver's Free World Dialup service, AT&T's VoIP service, and Vonage's Digital Voice service the Commission has established a pattern of determining the appropriate regulatory jurisdictional treatment of precise services and specific network architectures. PointOne urges the FCC to carefully consider the implications of the two new services described in AT&T's November 22 *ex parte*. A

¹ *AT&T Corp. Petition for Declaratory Ruling Regarding Enhanced Prepaid Calling Card Service*, WC Docket No. 03-133, (filed May 15, 2003) (*AT&T EPPC Petition*).

² November 22, 2004 *ex parte* Letter from Judy Sello to Marlene H. Dortch (Nov. 22 *ex parte*).

ruling that seeks to define what qualifies as an enhanced service has far reaching consequences. Rather than act precipitously, the Commission should issue a further notice seeking comment on the interactive EPPC service and the IP-based EPPC service so that it has a complete record to consider when deciding these important issues.

As AT&T implies in its Nov. 22 *ex parte*, the interactive and IP-based calling card services are new and, in fact, as of November 22, 2004, AT&T was only “considering implementing” these services.³ Accordingly, the compensation at issue in the RCA proceeding and AT&T’s original EPPC petition would be calculated based on the EPPC service described in that petition, and not based on these new services. This unique set of circumstances gives the Commission sufficient time to evaluate the regulatory status of the new services that AT&T has not yet deployed.

B. PointOne Urges Extreme Caution in Ruling on AT&T’s Two Potential New EPPC Services

As the Commission is no doubt aware, negative rulings on the definition of enhanced and IP-enabled services, even if intended to be limited to the very specific facts before it, can create unintended and significant collateral regulatory uncertainty – including exposure to new lawsuits – for IP services providers that have relied on the Commission’s repeated decisions to treat enhanced service providers as end-users rather than carriers. PointOne has deployed an all IP-based network that is capable of offering a wide range of enhanced features that would be impossible to provide over a network that primarily utilized circuit switches. By deploying an all IP network that can run a range of applications, PointOne has sought to maximize the efficiency of IP-based technology and facilitate the offering of innovative and sophisticated enhanced features and services. IP calling card platforms are only one type of service enabled by next-generation, IP networks.

PointOne is mindful that the FCC must ensure that universal service can be provided in high cost and underserved areas at reasonable rates. Rather than seeking to extend access charges on an *ad hoc* basis to IP-based services, we urge the Commission to address the intercarrier compensation and universal service failings head-on through comprehensive reform. Attempting to address these issues by imposing short term, but significant burdens on the facilities-based IP providers who have made considerable investments to be able to bring innovative IP services to consumers is not the right answer and will only fail in the long run. Instead, as the FCC has recognized, reform of the existing compensation and universal service contribution mechanisms will end the need for fact-specific evaluations and is essential to ensuring universal availability of affordable local service.

If, notwithstanding the lack of a record, the FCC addresses AT&T’s interactive service and IP-based enhancements as part of the original May 15, 2003 petition submitted by AT&T, the result may be unintended harm to facilities-based IP enabled

³ *Id.* at 3.

service providers whether or not they offer calling card services. ILECs will even more aggressively assert claims that IP-enabled service providers are subject to legacy access charges. The Commission should ensure that it is not decreasing the availability of innovative services by exposing IP-enabled providers to further lawsuits while at the same time it contemplates a comprehensive regulatory regime for all IP-enabled services as well as a compensation regime that moves away from access charges for the exchange of all traffic on the PSTN.

II. The FCC's AT&T VoIP Order Is Fact-Based and Has Limited Applicability

On April 21, 2004, the FCC released the *AT&T VoIP Order* ruling that a specific type of Internet Protocol (IP)-enabled voice service provided by AT&T, namely AT&T's 1+ dialed long distance service, is a "telecommunications service."⁴ The Commission found that as the end user's presubscribed interexchange carrier (PIC), AT&T is subject to interstate access charges under Commission Rule 69.5(b),⁵ which requires the assessment of access charges on "interexchange carriers" that use local exchange switching facilities.⁶ In a footnote, the Commission noted that other forms of VoIP that do not use 1+ dialing were "beyond the scope" of that proceeding.⁷ The Commission's *AT&T VoIP Order* therefore was fact-specific, decided on narrow grounds, and based, in large part, on the services AT&T actually offered to consumers as a self-described interexchange carrier.

III. Interstate and Intrastate Access Charges Do Not Now and Never Have Applied to Enhanced IP-Enabled Traffic

When the FCC was first establishing access charges, it expressly held that it would not apply access charges to enhanced services providers, creating what has been called the "ESP exemption." *MTS and WTS Market Structure*, Memorandum Opinion and Order, 97 FCC 2d 682, 715 (1983). Implementing this decision, the FCC added rule 69.5, which distinguished between end user charges and "carrier's carrier" charges, and imposed carrier's carrier charges only on "interexchange carriers." *Id.* at 769. In 1997, the Commission again reaffirmed, "the existing pricing structure for ISPs should remain in place and incumbent LECs will not be permitted to assess interstate per-minute access charges on [information service providers]." *Access Charge Reform*, First Report and Order, 12 FCC Rcd. 15982, 16133 (1997).

In the Commission's rulemaking to establish a comprehensive intercarrier compensation regime, the FCC again recognized that the current regime precludes assessment of access charges on information service providers:

⁴ *Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, WC Docket No. 02-361, Order, FCC 04-97 (rel. April 21, 2004) (*AT&T VoIP Order*).

⁵ 47 C.F.R. § 69.5(b).

⁶ *AT&T VoIP Order* at ¶¶ 12-16.

⁷ *Id.* at n. 58.

access charge rules, which govern the payments that interexchange carriers (“IXCs”) and CMRS carriers make to LECs to originate and terminate long-distance calls; and reciprocal compensation rules, which govern the compensation between telecommunications carriers for the transport and termination of local traffic. Such an organization is clearly an oversimplification, however, as both sets of rules are subject to various exceptions (e.g., long distance calls handled by ISPs using IP telephony are generally exempt from access charges under the enhanced service provider (ESP) exemption).⁸

In the same rulemaking, the Commission goes on to describe the difference between entities that purchase services as carriers and those that purchase as end users. The Commission states that:

when entities connect to telephone networks as end users rather than as interconnecting networks, they do not pay usage-sensitive access or reciprocal compensation charges. For example, residential customers typically pay flat-rated subscription charges (or occasionally, local measured service rates), while business customers typically pay a flat monthly charge, plus a per-minute or per-call charge for originating calls. ESPs, including ISPs, are charged pursuant to the same rules that apply to local end users and are exempt from access and reciprocal compensation charges, even though the calls they send and receive generally travel outside the local service area.⁹

The *AT&T VoIP Order* did not reverse the Commission’s longstanding precedent treating information service providers, including IP-enabled service providers, as end-users, not carriers.¹⁰ Indeed, the Commission could not have done so in that order, inasmuch as changing the express terms of Rule 69.5(b) to expand the scope of carrier’s carrier charges to entities other than interexchange carriers would have required a rulemaking. As a declaratory ruling, the *AT&T VoIP Order* is applicable only to the facts presented by AT&T’s specific service, limited by the express terms of the existing rules. The Commission stated that “[t]his order represents our analysis of one specific type of service under existing law based on the record compiled in this proceeding.”¹¹

⁸ *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, Notice of Proposed Rulemaking, 16 FCC Rcd 9610, 9613, ¶6 (emphasis added) (*Intercarrier Compensation NPRM*).

⁹ *Id.*, 16 FCC Rcd at 9613, ¶ 10. Although the ESP does not directly pay reciprocal compensation, carriers serving the ESPs pay reciprocal compensation to terminating carriers and recover those costs in the rates they charge the ESPs.

¹⁰ See, e.g., *MTS and WATS Market Structure*, Third Report and Order, 93 F.2d 241 (1983) (adopting Rule 69.5), *affirmed sub nom Nat’l Ass’n of Regulatory Util. Comm’rs v. FCC*, 737 F.2d 1095 (D.C. Cir. 1984); *Report to Congress*, 13 FCC Rcd at 11511-12, 11523-24 (¶¶ 26, 44-46) (noting that information service providers are not carriers).

¹¹ *AT&T VoIP Order* at ¶ 10.

In the *AT&T VoIP Order*, the Commission was not reviewing the compensation regime for all IP services generally, and terminating carriers disputing the current intercarrier compensation regimes must rely on fact specific determinations under the existing rules or await a final determination of the appropriate compensation mechanisms for IP services to be determined in the *Inter-carrier Compensation* rulemaking and the *IP-Enabled Services Rulemaking*.

IV. Conclusion

Given the ongoing IP-Enabled Services rulemaking and the Intercarrier Compensation proceeding, incumbent LECs are not permitted to determine unilaterally the parameters of the *AT&T VoIP Order* or whether specific types of VoIP services fall precisely within those parameters. Incumbent LECs' unilateral imposition of access charges on VoIP providers amounts to a discriminatory and unlawful premature interpretation of the outcome of the Commission's on-going proceedings regarding IP-enabled services and intercarrier compensation.

In any order on the AT&T EPPC petition, the Commission should be clear that it is addressing only the service described in AT&T's initial petition, and that it is not addressing AT&T's November 22, 2004 amendment in the EPPC Petition for Declaratory Ruling regarding its new calling card services. Moreover, the Commission should reaffirm the limited scope of the *AT&T VoIP Order*.